ESA: Reforming our Reformist Mindset

Today, the national debate over Endangered Species Act reform has reached a fevered pitch. Congressional Committees repeatedly docket the issue for hearings, without much actual movement on the matter. Meanwhile, states, like Wyoming, labor in the day-to-day applications of the Act with little or no respite in site. Clearly, something is broken, the question is what.

In 1998, on the day the Preble's meadow jumping mouse was formally listed as a threatened species, the U.S. Fish and Wildlife Service held a briefing on Capitol Hill. During the briefing, a keen Western Congressional staffer inquired about the anticipated effects of the listing on the agricultural community and on agricultural operations. In response, a young Service biologist confidently assured the staffer that "So long as the agricultural activities are undertaken during the mouse's time of hibernation, agricultural operations are permitted." The obvious follow-up ensued, "When does the mouse hibernate?" "Well," said the biologist, "from October through April." Puzzled and somewhat acerbic, the staffer retorted, "So, you're telling me that so long as we plant, harvest, irrigate and grow our crops and graze our livestock during the winter, we are OK?" Undeterred, and happy that he had met the concerns of the Congressional aide, the Service biologist responded, "Yep, that's exactly right."

While the repartee between the biologist and Congressional staffer might simply highlight the misgivings of never having been acquainted with agriculture, I believe it demonstrates much more – it demonstrates that one man's perfectly logical answer is non-sense to another.

In my view, true movement and true reform occurs on the margins of an issue. While certain laws are intrinsically flawed, I do not believe, other than maybe with regard to critical habitat, the ESA is one of them. Each of us can honestly agree today, as Congress did in 1973, that protecting endangered and threatened plants and animals is a salutary public purpose. The Act, in itself, does little to detract from this point of commonality. The true problem lies with how the Act is applied and who is providing the application. As stated, these problems have very little to do with the words that assemble together as the Endangered Species Act. Rather, they have everything to do with the regulations and personnel that have been employed to interpret the Act. With this in mind, I propose that the perfectly logical answer of ESA statutory reform is pure non-sense to me – again, outside the context of critical habitat reform. So I propose that we reform our reformist mindset, and transition to a more pragmatic and practical approach to making the ESA better.

1. Adequate Regulatory Mechanisms.

The Endangered Species Act presents five factors that must be considered when determining if a species should be listed as endangered or threatened. One of these factors asks for the Services to gauge whether "adequate regulatory mechanisms" exist to protect the species. We have somehow come to the point of almost assuming that these

"adequate regulatory mechanisms" are the responsibility of the states, local governments or private parties. There are ample guidance papers advising states, local governments and private parties regarding the crafting of "adequate regulatory mechanisms." Importantly, the language of the Endangered Species Act does not expressly contemplate or compel states, local governments or private parties to be the exclusive crafters of such "adequate regulatory mechanisms." In my view, the federal government should assume its equal or greater responsibility to craft "adequate regulatory mechanisms," which will ultimately be the foundations of de-listing efforts. The states are oftentimes ill-equipped, financially and otherwise, to meet the needs of troubled species. While the federal government may be experiencing similar difficulties, we must remember that the ESA represents a federal program. The weight of federal programs should be borne by the expanse of the federal government, not displaced as a matter of course (with a hint of coercion) to the states.

As an example, I offer the case study of the gray wolf. As most of you know, the gray wolf was reintroduced into Wyoming, Idaho and Montana by the Fish and Wildlife Service. From the inception of the concept of reintroduction, the Service had no long-term intentions on managing wolves. Rather they saw states as the perfect laboratory (and funding entity) for wolf management. In return for de-listing the wolf, the states would receive management "authority" – that was the bargain. In the course of enduring our current legal dispute with the Service over the wolf and wolf management, I came to question – why are we doing this? As states, we fall all over ourselves to get species de-listed, to the point of enacting laws and rules that have at their aim, the accomplishment of a federal goal. Why should Wyoming, Idaho and Montana carry federal water? In my view, the federal government should be more responsible for recovering endangered and threatened species than the states – after all, they were the ones that sounded the alert by listing the species (and in some cases reintroducing them). As a result, states should not be the only ones responsible for providing adequate regulatory mechanisms that, in the end, will lead to the de-listing of a species. The federal government must share its equal or greater burden in this discussion.

2. Listings must be drawn in such a way that account for local conservation.

Currently an endangered or threatened listing can apply to a species, subspecies or a Distinct Population Segment (DPS). While species and subspecies are defined rather narrowly through science, the DPS is a regulatorily defined designation. To make the ESA operate more effectively, the DPS policy should be re-crafted to consider geopolitical lines in listing and de-listing decisions. Simply put, if a species is eligible for listing in most of its range, but Oregon can show that the species is doing well and is secure in Oregon because of regulations, habitat conditions or otherwise, Oregon should not be looped into the listing. Similarly, if Florida can show, through the de-listing process, that the species no longer qualifies as an endangered or threatened species in Florida, at a minimum, the Florida population should no longer be subject to ESA

constraints. Clearly, if the entire population does not warrant ESA protection, the entire population should not be listed.

Procedurally, during the comment period on listing and de-listing decisions, the states should have the opportunity to request that the ESA listing factors be evaluated within each "requesting state" to determine the applicability of each factor to that population of the species residing within that state's boundaries (no smaller subdivision of land or government should be considered). If the listing factors are not met within a state's geopolitical border, the ESA's intent of preserving species is already being met in that state, and a listing in that state would be precluded or discontinued (in the case of an already listed population). Regardless, incentives should be built in to encourage states not part of the listing to conserve the species and its habitat.

By finally recognizing that the "species" within each state are "distinct" as a function of where they happen to be located on a map (different states have differing degrees of habitat functionality, regulatory protections, etc.), science, and for that matter reality, is ultimately served. In the end, the states are the laboratories of species management and they should be given every benefit, opportunity and incentive to demonstrate the effectiveness of their individual efforts – as it is their individual effort that will protect the species.

3. Habitat and habitat function are critical in the protection of any species, no less an endangered species.

Habitat degradation is currently recognized as the leading cause of species loss in the world. With importance of the vast expanses of federal land to species viability, particularly in the West, and the current state of federal lands and the notion that we could do more to bolster the quality of such lands, habitat improvement is a necessary consideration. Thus, a minute portion of federal mineral royalties, collected from federal lands within each state, should be set aside to conserve and improve habitats on federal lands. In my view, the funds should be allocated roughly as follows: 30% to the state where the royalty was generated, 40% to be divided– pro rata – based on total federal land ownership and 30% to be divided among all states evenly.

In Wyoming, the Wildlife and Natural Resources Funding Act was introduced this legislative session to achieve habitat and natural resource preservation. If passed, a trust will be established, with the trust income being allocated to individual habitat conservation measures. The same concept, executed at the federal level, could greatly benefit federal lands and the species that reside on them.

4. Without funding, we essentially ask the Service to do more, with less.

As states, we remain frustrated by the lack of action on petitions, the lack of science, the lack of response to our inquiries and the lack of true recovery efforts. We also rail against the lack of federal dollars to help recover those species that the federal government lists within our boundaries. The simple solution is money, but money is the main lever available to control the power of the Services. Thus, in order to attract more funding, controls must be attached to the funds.

President Bush separated the Services' funding into particular streams: one for listing and the other for "recovery." This separation has given some control to those that appropriate funds to define the course and priorities of the Services. In short, Congress can give more money to the recovery budget and less to the listing budget. In Wyoming's view, there should be three, clear streams of funding. While de-listing considerations may be wrapped into the recovery budget stream, they merit individual attention. To be sure, de-listing, and for that matter listing, is a process that should consider recovery efforts. However, the listing and de-listing process contemplates reviewing petitions and other administrative activities, which of themselves could devour the currently allocated "recovery and/or listing sub-budget." In our view, recovery is something that is beyond process and over-administration – it is an active process where people get their hands dirty. Dirty hands working to meet the goal of species recovery should never be sacrificed to bureaucratic process. Listing, de-listing and recovery are three distinct concepts and should be funded and considered of themselves.

Additionally, as our effort with sage grouse illustrated, states can help deal with species of concern prior to invoking the full authority of ESA. Truly, state involvement is a very efficient way of achieving the stated intent of ESA. The old wives tale of: "an ounce of prevention is worth a pound of cure" is instructive. Prevention is much cheaper, more effective, and an easier conservation path than the route of listing/delisting, as is evidenced by the difference between sage grouse and grizzlies in Wyoming. A mechanism for providing prevention funding is available under Section 10 of ESA, and simply awaits proper funding and administration. Funding incentives can be used to entice private landowners (who own a great deal of sensitive species habitat) to do proactive conservation, instead of the current method of listing and then trying to force them, through regulation, to do something beneficial (which certainly isn't working).

5. Peer Review.

A very recent and stinging reminder of ESA difficulties is associated with scientific peer review. The problem with the Preble's meadow jumping mouse was not that the peer review was done, but that it was done by interested parties with a vested interest in the listing process. Current guidance strongly discourages interested persons from participating in peer review. Regardless, in the case of the Preble's, the Colorado Division of Wildlife, in conjunction with the Service, appointed a peer review panel that

was by no means impartial to review the science that was ultimately relied upon to arrive at a decision to de-list the mouse.

Peer review in the ESA is functionally a tiered system. There is the first line of Service-selected review and a second line which consists of a very expensive and time consuming National Academy of Sciences review. The problem with the first tier is that there is no sure way to safeguard it from conflicts of interest, bias, etc. The problem with the second is cost and time. Wyoming's view is that the initial peer review group be selected, two each, by (1) the FWS director; and (2) the Game and Fish Director(s) from the states affected by the decision. Regardless, the selection of peer reviewers should neither be absolutely discretionary nor, as is the case now, subject to a singular point of discretion.

I would further suggest this peer review system be used for all major decisions for ESA (listings, delistings, 4(d) rules, recovery planning). This is only reasonable, as states (and particularly state wildlife agencies) have more management expertise and are relied on to implement the action items resulting from these decisions. It only makes sense that state managers should lend their expertise in planning those action items that they are expected to implement.

6. Personnel Concerns.

A real ESA problem lies with the mid-level bureaucrat that, for all intents and purposes, can derail the process of listing or de-listing of a species. In Wyoming, two species, the grizzly and wolf, and two careers are intertwined with the biologists in charge of the recovery and eventual de-listing of the species. While this may be a necessary outcrop of specialization, the Service must ensure that careers are not perpetuated by either the lack of action or movement that, in the end, has a negative effect on true species recovery. In a related area of concern, the Services must also guard against what essentially rises to the level of doctoring a record to meet individual missions, as opposed to that of the ESA – species recovery and preservation. To remedy this concern, the States should be given the opportunity to directly participate in and oversee the day-to-day operations of the Services in achieving recovery, listings and de-listings, in a system akin to Cooperating Agency Status. Such could be accomplished with a Director's Order at this juncture. By opening the doors and files of the Services to the truth-checking of states, the record can be protected from undue insertions and the bureaucrat's motives can be checked.

Conclusion:

The Act has a truly noble goal. We all want to see species protected. Unfortunately, the Act has taken the singular form of a hammer, with only nails in sight. For sure, the Act has become a hammer to control land use patterns, attract funding and propel egos. While harsh, reality must find our current discussion at some point. By recognizing these realities, we can start to get to the true heart of reform – ensuring those with vested interests (egos, funding and land use control) that they can achieve their ends without resorting to, and diminishing the credibility of, the Act. Thus, I ask you to consider my thoughts and join me in my renewed effort to reform the ESA reform movement.